No. 22342

In the

United States Court of Appeals

For the Ninth Circuit

Farmers Insurance Exchange, *Appellant*,	
vs.	
Joe Rose, Jr. and Veronica Rose, his wife, *Appellees*.	

Appeal from the United States District Court
for the District of Arizona

Brief for Appellees
Joe Rose, Jr. and Veronica Rose, His Wife

FILED

MAR 11 1968

WM. B. LUCK, CLERK

James H. [illegible], Jr.
[illegible]
Phoenix, Arizona [illegible]
Attorney for Appellees

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 22342

In the

United States Court of Appeals

For the Ninth Circuit

FARMERS INSURANCE EXCHANGE,
Appellant,

vs.

JOE ROSE, JR. and VERONICA ROSE, his wife,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Brief for Appellees
Joe Rose, Jr. and Veronica Rose, His Wife

APPELLEES STATEMENT OF THE CASE

On or about January 10, 1964, Mr. Peter Garfield was an automobile insurance agent employed by Appellant Farmers Insurance Exchange in Phoenix, Arizona. (Deposition of Mr. Garfield, May 27, 1966, page 4). On that date Mr. Garfield visited the office of David Vassar in Phoenix, Arizona, for the purpose of attempting to sell him automobile lia-

Vassar's name, Appellant issued two policies of insurance to Mr. Vassar effective as of January 10, 1964.

Appellees have denied, as has Mr. Vassar in the case prior to this appeal, that Mr. Vassar made any statements and representations that were fraudulent or material to the acceptance of the risk and hazard to be assumed by Appellant. It has also been contended by Appellees that Appellant knew from its own investigation that Mr. Vassar had received four citations in Arizona instead of two and that Appellant could have, in exercise of reasonable care, ascertained prior to the accident that Mr. Vassar had also received two citations in California and one additional citation in Arizona.

On or before January 29, 1964, the Appellant did conduct an investigation to determine for itself how many citations the insured David Vassar had received in the prior three year period. In spite of the fact that David Vassar had mentioned to Mr. Garfield that he had received citations in the State of California Appellant did not seek information at that time regarding prior citations from the Motor Vehicle Division of the State of California, but limited its inquiry to the Arizona Motor Vehicle Division. Had it obtained a report from California prior to March 24, 1964, Appellant could have ascertained that their records showed two citations received by Mr. Vassar within the prior three years.

Pursuant to its inquiry Appellant was informed prior to January 29, 1964, that the records of the Arizona Motor Vehicle Division showed that Mr. Vassar had received the following citations in the prior three year period: 1963—one citation; 1962—two citations; 1961—one citation.

Prior to January 29, 1964, the insurance file of Mr. Vassar was reviewed by Appellant and the discrepancy between the number of citations as shown by the application form prepared and signed by Mr. Garfield and the Motor Vehicle

Division report from Arizona was noted. Appellant then caused an additional investigation to be made of Mr. Vassar and it obtained a report upon him on or before February 18, 1964. The policies of Mr. Vassar were continued in force and effect and were not cancelled by Appellant. Appellant did not request any supplementary Arizona Motor Vehicle Report in spite of the fact that it knew there was a time lag between the date a citation was issued and the appearance of that fact on the records of the Motor Vehicle Division. Appellant could have ascertained prior to March 24, 1964, that the Arizona Motor Vehicle Division records showed one additional recent citation.

On March 24, 1964, while driving one of the automobiles insured by Appellant, David Vassar collided with a vehicle driven by Appellee Joseph Rose, Jr., and in which his wife Veronica Rose was a passenger.

On May 26, 1964, Appellant sent David Vassar a notice of cancellation of his said insurance policy to be effective as of April 11, 1964.

On May 26, 1964, Appellant filed his complaint in this action asking that the said insurance policy be declared void and that no coverage be extended to its insured David Vassar.

On October 9, 1964, Mr. and Mrs. Joseph Rose, Jr., filed in the Superior Court of Maricopa County, State of Arizona, an action No. 167161 against David Vassar and his wife. The said lawsuit proceeded to trial before a jury and a verdict was returned in favor of Mr. and Mrs. Rose and a judgment was entered by the Court on November 18, 1966, for Veronica Rose in the sum of $60,000.00 and Joseph Rose, Jr., in the amount of $15,000.00 and for both Plaintiffs in the amount of $1,000.00.

After the said judgment, on December 20, 1966, the Appellant paid Mrs. Rose, in partial payment and satisfac-

tion of the said judgment, the sum of $10,000.00 and paid Mr. Rose in partial payment and satisfaction of said judgment the sum of $8,250.00. Appellant had already theretofore paid the sum of $1,750.00 to another party who was injured in the same collision involving its insured David Vassar so that Appellant has now paid the total of $20,000.00 on the policy issued to David Vassar.

On May 25, 1967, the Supreme Court of the State of Arizona issued its opinion in *Sandoval v. Chenoweth,* 428 P.2d 98.

On July 3, 1967, Appellees moved for Summary Judgment and after argument Appellees' motion was granted and from the Summary Judgment of July 28, 1967, Appellant has taken this appeal.

APPELLEES' CONTENTIONS AND ARGUMENTS IN SUPPORT THEREOF REGARDING APPELLANT'S "SPECIFICATIONS OF ERROR".

With respect to Appellant's Specification Of Error No. 1 Appellees contend that:

A. The issue as to Appellant's liability, to the extent of the statutory required minimum insurance of $10,000.00 and $20,000.00 is moot and not in issue in view of the fact that Appellant has in actual fact paid the sum of $20,000.00 to the persons injured in the collision involving its insured, David Vassar.

This fact was pointed out in Appellant's Supplemental Memorandum of Points and Authorities filed in Support of their Second Motion for Summary Judgment and was uncontested.

The Appellant's motion in the lower court for Summary Judgment was, in the alternative, for "an order pursuant to Rule 56(d) and/or Rule 16 determining that Plaintiff is

in no event liable to Defendants, or any of them, as a result of the accident described in the Plaintiff's complaint for more than $10,000.00 for one injury to any one person or more than $20,000.00 for injuries sustained by all persons". This motion was heard and on September 16, 1966, was denied by a judge other than the judge who granted the motion of Appellees for Summary Judgment.

B. The Appellant, upon the facts of this case, was clearly liable at least to the extent of the statutory required minimum amounts of $10,000.00 and $20,000.00, even under the cases preceding *Sandoval v. Chenoweth,* 428 P.2d 98.

This contention is based upon the holdings and the language of the Arizona Supreme Court in:

Schecter v. Killingsworth, 93 Ariz. 273; 380 P.2d 136 (1963);

Jenkins v. Mayflower, 93 Ariz. 287, 380 P.2d 145 (1963);

Pacific Indemnity Co. v. Hamman Wholesale Lumber and Supply Co., Inc., 95 Ariz. 362, 390 P.2d 897 (1964).

With respect to all three of Appellant's Specifications Of Errors it is contended that:

A. Under the facts of this case and in view of the decision of the Arizona Supreme Court in *Sandoval v. Chenoweth,* supra, the U. S. District Court did not err in granting Appellees' Motion for Summary Judgment herein.

Appellees base their argument in support of this contention upon the decision of the Arizona Supreme Court in the *Sandoval v. Chenoweth* case, supra, and the Arizona Supreme Court decisions in the other cited cases which provide the background and show the direction of the Arizona Supreme Court on this subject.

The cases cited by Appellant in its argument are not in

point here in that they either do not interpret the law of the State of Arizona or they were decided prior to the *Sandoval* case, supra.

It is interesting to note that the attorney for Appellant in his memorandum of law filed on August 9, 1966, in support of his motion for Summary Judgment cited *Sandoval v. Chenoweth,* 2 Ariz. App. 553, 410 P.2d 671, which was the decision in the case by the Arizona Court of Appeals. The Court of Appeals decision was quoted by Appellant's attorney as saying:

> "We agree with Financial Indemnity Co. that the Financial Responsibility Act of the State of Arizona does not abrogate the policy defense of failure of the insured to give notice of the filing of a lawsuit to the insurance carrier. The policy involved is a voluntary policy. The policy was not issued to the insured to satisfy his proof of financial responsibility. The policy defense of notice of a lawsuit is one which the insurance company may properly assert after the accident to defeat liability. It is our opinion that the Arizona Supreme Court case of *Jenkins v. Mayflower Ins. Exch.,* 93 Ariz. 287, 380 P.2d 145 (1963), should not be extended to include the situation in the case at bar."

The issue was therefore squarely before the Arizona Supreme Court on the appeal from the decision of the Arizona Court of Appeals.

It is respectfully submitted that the Arizona Supreme Court in its pre-*Sandoval,* supra, decisions on this issue had stated clearly that A.R.S. 28-1170 F meant what it said. It is submitted that it reiterated that once again in the *Sandoval* decision, and went beyond the prior decisions to say that the liability which became absolute when injury occurred was applicable to the full extent of the liability insurance policy limits and was not limited to the statutory required minimum amounts.

It should be kept in mind that when it decided the case of *Sandoval v. Chenoweth,* supra, the Arizona Supreme Court had had the opportunity of seeing and considering the decision of this Court in *Weekes v. Atlantic,* 370 F.2d 264 (1966), which was decided earlier.

In *State Farm Mutual Automobile Insurance Co. v. Thompson,* 372 F.2d 256 (Jan. 24, 1967) this Court said at page 260:

> "However, in Jenkins v. Mayflower Insurance Exchange, 93 Ariz. 287, 380 P.2d 145, it was held that the omnibus clause in A.R.S. 28-1170, subsec. B., par. 2, is to be considered a part of every insurance policy issued in the State of Arizona and that an insurer cannot limit its liability contrary to its terms. In so ruling, the Supreme Court of Arizona refused to distinguish between voluntary and certified policies of insurance in applying the mandatory omnibus clause. Under this ruling, which is binding upon us, the provisions of A.R.S. 28-1170, subsec. F must be considered a part of the policy involved in this case." . . .

The Court at page 261 said of the *Mayflower* decision:

> "Needless to say, we must accept the 'Mayflower' pronouncement as long as it states the law of Arizona, and may not inquire as to its correctness. If 'Mayflower' is to be overruled it must be by the Supreme Court of Arizona."

Surely the decision in the *Sandoval* case is entitled to the same treatment by this court as the *Mayflower* case.

CONCLUSION

Appellees respectfully submit that in the *Sandoval v. Chenoweth* case, supra, the Arizona Supreme Court has held that under Arizona law when:

1. A policy of liability insurance is issued covering the owner or operator of a Motor Vehicle, AND

2. Injury or damage covered by the said policy occurs, THEN

A. The liability of the insurance carrier becomes absolute and can not be cancelled or annulled, AND

B. The insurer is liable to the full extent of the policy limits.

We submit that the U. S. District Court Judge properly applied the Arizona law as announced in the *Sandoval* case, supra, to the facts of this case and properly granted Appellees' Motion for Summary Judgment.

James H. Green, Jr.
32 Luhrs Arcade
Phoenix, Arizona 85003

Attorney for Appellees

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

James H. Green, Jr.